IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN JOSEPH EDWARD	:	CIVIL ACTION
	:	
v.	:	
	:	
A. WESLEY WYATT	:	NO. 01-CV-1333

MEMORANDUM & ORDER

J.M. KELLY, J. **AUGUST , 2002**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a non-jury trial in the above captioned matter, and review of the pleadings filed by the parties, the Court makes the following Findings of Fact, Conclusions of Law and decision.

FINDINGS OF FACT

1. Plaintiff John Joseph Edwards ("Edwards") is a citizen of the State of South Carolina.

2. Defendant A. Wesley Wyatt ("Wyatt") is a citizen of the Commonwealth of Pennsylvania.

3. The amount in controversy between Edwards and Wyatt in this case is alleged to exceed $75,000.

4. In 1993, Edwards was the President of Pilot Air Freight Corporation ("Pilot"), an air freight forwarding business which was headquartered in Lima, Pennsylvania.

5. In 1993, Edwards owned one-third of the stock - 33 and 1/3 shares out of 100 total issued shares - in Pilot. The

remaining two-thirds of the company was owned by Edwards' cousins, Tom and Bill Edwards ("the Edwards cousins"), in equal amounts.

6. In 1993, Edwards was introduced to Wyatt by Richard G. Phillips ("Phillips"), a local Philadelphia attorney who was counsel for Pilot, Edwards and Wyatt at the time. Phillips thought that Wyatt might be able to help Pilot by investing in the company.

7. In January of 1994, Wyatt became an investor in Pilot and secured an option to purchase 45 shares in the company from the Edwards cousins. Wyatt was also given the right to appoint individuals to fill two seats on Pilot's five person Board of Directors.

8. In January of 1994, through the same transaction in which Wyatt became an investor in Pilot, Phillips was made the Chairman of Pilot and acquired 10 shares in the company from the Edwards cousins. Phillips also became the Voting Trustee over the remaining 11 and 2/3 shares of the company owned by the Edwards cousins. Phillips was also given a seat on Pilot's Board of Directors.

9. In January of 1994, through the same transaction in which Wyatt and Phillips became involved in Pilot, Edwards was given a three-year Employment Agreement with Pilot, which provided that he would be paid $200,000 in salary per year and be

eligible to receive annual bonuses up to the same amount from the company. Edwards fully retained, however, his one-third ownership interest in Pilot. Edwards was also given the right to appoint individuals to fill the remaining two seats on Pilot's Board of Directors.

10. In May of 1994, Edwards decided to adopt an exit strategy from Pilot because of Phillips' approach to running it, and hired attorney Don Auten to help him with that strategy.

11. At the dinner meeting in March or April, 1995, Wyatt and Edwards agreed to take some corporate governance action to "era[dicate] Mr. Phillips from the Company."

12. Wyatt and Edwards decided to join forces to exercise the combined power of the seats they controlled on Pilot's Board of Directors to vote to remove Phillips as Chairman of the company. Wyatt and Edwards also decided to terminate Pilot's retainer agreement paying $7,000 per week to Phillips' law firm.

13. Shortly thereafter, Edwards' attorney gave him Plaintiff's Exhibit 9, an April 13, 1995 press release from Pilot announcing that Edwards was out and Phillips was back in at Pilot, because Wyatt had realigned himself with Phillips.

14. Wyatt never called Edwards to discuss the franchisees' concerns that led to his decision to change sides.

15. Plaintiff's Exhibit 12 is a transcript of the April 20, 1995 Pilot Board Meeting where Wyatt aligned himself with

Phillips to vote Edwards out of Pilot and put Phillips back in charge of the company. At that meeting, Wyatt and Phillips gave employment agreements to each other. Wyatt's agreement was for eight years at $200,000 a year, plus bonuses and other benefits.

16. Sometime shortly after the April 20th board meeting, Wyatt had a discussion with Phillips about Edwards. Phillips told Wyatt point blank that he was going to cut off Edwards' money and litigate him into the ground which stunned Wyatt.

17. On August 20, 1996, Edwards commenced a bankruptcy proceeding under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. In re: John Joseph Edwards, Bankruptcy No. 96-17868 (DWS).

18. The assets of Edwards' bankruptcy estate consisted of his one-third interest in Pilot, a one-third interest in a real estate partnership which owned land upon which Pilot's businesses were situated, and certain claims Edwards had against third parties including Wyatt, Pilot and Phillips ("Edwards' Assets").

19. In February, 1997, Edwards' Chapter 11 reorganization was converted to a Chapter 7 dissolution.

20. A Chapter 7 Trustee, Christine Schubert, was appointed and proceeded to employ a valuation expert to value Edwards' Assets.

21. The Trustee's valuation expert, Steven Scherf, CPA, fixed a value of $2,745,000 for Edwards' Assets: $2,600,000 for

the interest in the Pilot stock and $145,000 for the interest in the Edwards partnership.

22. In the fall of 1997, Wyatt owned forty-five percent of the issued and outstanding stock of Pilot, Edwards' Chapter 7 Trustee controlled his thirty-three and one-third percent of Pilot's stock, and the balance of Pilot's stock was owned or controlled by Phillips, who also served as Pilot's President and Chief Executive Officer.

23. In December 1997, one of Wyatt's lawyers, Jay Ochroch, Esquire ("Ochroch"), and Edwards' lawyer, Stephen L. Braga, Esquire ("Braga"), met to discuss a potential alignment between Edwards and Wyatt and the possibility of trying to effect a sale of Pilot.

24. During December, 1997, Braga also met with Phillips to discuss a possible alignment with Edwards. Edwards and his counsel later decided to pursue their negotiations with Wyatt.

25. On February 18, 1998, Edwards and Wyatt executed a written settlement agreement, in furtherance of their mutual ambition to sell either the assets or the stock of Pilot ("the Settlement Agreement").

26. The Settlement Agreement contains an integration clause that specifically and expressly provides that the Settlement Agreement "and the documents delivered pursuant hereto constitute the entire agreement and understanding between the Parties hereto

as to the matters set forth herein and supercede and revoke all prior agreements and understandings, oral and written, between the parties hereto or otherwise with respect to the subject matter hereof."

27. The Settlement Agreement integration clause commits the parties to change the Settlement Agreement only in writing: "[n]o change, amendment, termination or attempted waiver of any of the provisions hereof shall be binding upon any party unless set forth in an instrument in writing signed by the parties."

28. Edwards attended the meeting with the Trustee where a presentation was made to try to convince her to support a joint motion to make an Initial Public Offering ("IPO") of Pilot. There were a number of professionals at the meeting. They were there primarily to demonstrate to the Trustee the valuation that they had put on Pilot.

29. At the Trustee meeting, the brokerage firm of A.G. Edwards showed its valuation for Pilot ranging 14 to 24 times earnings, and Penn Merchant Group Limited made a similar statement. At the meeting, Edwards recalled that Wyatt spoke of similar numbers that the others had estimated the valuation to be worth roughly $60 to $120 million.

30. Wyatt and Edwards filed a joint motion to have the bankruptcy court approve the IPO proposal. The bankruptcy judge denied the joint motion in short order.

31. On March 12, 1998, the Trustee filed her Motion of the Chapter 7 Trustee to Sell Assets (the "Sale Motion").

32. Pursuant to the Sale Motion, the Trustee sought the sale of Edwards' Pilot stock to Phillips for $3.4 million and mutual releases by the estate and Pilot for various claims pending between the estate and Pilot.

33. On April 30, 1998, when it became apparent that Wyatt and Phillips were now involved in a bidding contest for Edwards' stock to avoid being in a minority position, Wyatt and Edwards agreed that neither would enter into any agreement with Phillips to settle the bankruptcy sale proceeding without the participation of the other party (the "Handshake Agreement").

34. Ira B. Silverstein, Esquire, ("Silverstein") one of Wyatt's attorneys, testified that under the Handshake Agreement, if either Wyatt or Edwards took an unreasonable position, the other party would no longer be bound by the Handshake Agreement.

35. The Handshake Agreement was never reduced to writing.

36. The Handshake Agreement was totally different from the February 18th written settlement agreement. As Braga put it at trial: "By the time of the handshake agreement, it was clear the two options in the written agreement, the IPO motion and the Chapter 7 to 11 conversion motion, were not going to work, so the written agreement . . . was fulfilled by that point in time. The handshake agreement was an additional agreement made in light of

the changed circumstances that those two things didn't work."

37. The mutual consideration underlying this new agreement was: Wyatt did not want Edwards to reach an agreement with Phillips any more than Edwards wanted Wyatt to reach an agreement with Phillips. By standing together, they were each stronger.

38. On or about May 7, 1998, Wyatt tendered a bid of $3.6 million for Edwards' Assets.

39. On May 11 and June 17, 1998, the Trustee put on her evidence in support of a sale based on the Phillips bid.

40. Edwards objected to this sale as being undervalued and moved the Bankruptcy Court to deny the Trustee's motion and to allow him to return to Chapter 11 to reorganize his stock interests in some form of private offering. The Bankruptcy Court overruled this request, adjourned the hearing at the request of Wyatt and subsequently, on July 16, 1998, entered an order establishing certain procedures for concluding the sale.

41. Pursuant to the Bankruptcy Court's July 16, 1998 Order, Wyatt, on July 20, 1998, submitted a bid of $5 million in cash supplemented by a bond of up to $3 million to secure payment of the Pilot claims against the estate when liquidated.

42. On July 29, 1998, Phillips, in collaboration with Pilot's franchisees, many of whom supported his bid in filed pleadings, profferred the sum of $5.1 million along with an offer to settle Pilot's claims against Edwards' bankruptcy estate by a

mutual release.

43. At the request of counsel for the Pilot franchisees, the hearing to confirm the sale was adjourned until October 30, 1998, at which time the Bankruptcy Court ordered a final auction to take place.

44. Although Braga claims there was some confusion over Wyatt's understanding of the July 29th continuance, Braga admitted at the time that Edwards would not have been prejudiced as a result of the continuance so long as the bids in place at the time were made irrevocable.

45. Wyatt had authorized Ochroch to bid up to $10 million for the Pilot stock.

46. On July 30, 1998, Braga wrote to Ochroch and Silverstein expressing his concern about the relationship between Wyatt and Edwards because, "as a result of the July 29th hearing . . . Mr. Silverstein had instructed Mr. Wyatt not to talk to Mr. Edwards anymore and it's hard for two people to have an alignment going forward if you're not talking to each other."

47. On July 31, 1998, Braga again wrote to Ochroch and Silverstein and informed them that: " . . . [Edwards] has asked me to endeavor to negotiate his own independent settlement in this matter. I have been authorized to give you (and, thus [Wyatt]), a one-week period within which to conclude a settlement agreement with [Edwards]. If such an agreement has not been

concluded within that time, then I have been directed to provide the same opportunity to Mr. Phillips, which I will initiate on Friday, August 7th, if necessary."

48. Wyatt understood the July 31, 1998 letter to mean that the "Handshake Agreement" was terminated.

49. Braga did not write a letter confirming that he was withdrawing his July 31, 1998 repudiation letter, nor did Braga confirm that the Handshake Agreement was still in effect.

50. There is no evidence that Wyatt and Phillips entered into a new agreement following Braga's July 31, 1998 repudiation letter.

51. On October 30, 1998, Wyatt and Phillips jointly offered a cash bid of $5.2 million, plus the claims settlement (the "Joint Bid") pursuant to a Settlement Agreement entered into between Wyatt, Phillips and others.

52. Edwards' prepetition claims for salary and bonuses due from Pilot were property of Edwards' bankruptcy estate which were released by the Trustee in connection with the Wyatt/Phillips Joint Bid.

53. On November 2, 1998, Edwards made a $15 million settlement proposal to Wyatt ($9.8 million in addition to the $5.2 million to be paid pursuant to the bid).

54. Wyatt rejected Edwards' offer and did not propose another offer because the $15 million offer was "not negotiable."

55. Edwards objected to the Joint Bid submitted by Wyatt and Phillips.

56. On December 15, 1998, Bankruptcy Judge Sigmund issued an order granting the Trustee's Sale Motion to sell Edwards' Assets pursuant to the Joint Bid submitted by Wyatt and Phillips.

57. On December 28, 1998 Edwards filed a notice of appeal of Judge Sigmund's December 15, 1998 order.

58. On August 8, 1999 Edwards withdrew his appeal.

CONCLUSIONS OF LAW

1. The Handshake Agreement represented an enforceable promise. Wyatt and Edwards each mutually agreed not to enter into any agreement with Phillips without the participation of the other party. See Channel Home Centers v. Grossman, 795 F.2d 291, 298-299 (3rd Cir. 1986) (stating test for enforceable agreement under Pennsylvania law).

2. The facts at trial established that Wyatt's agreement with Phillips, without the participation of Edwards, would have been a breach of the Handshake Agreement.

3. Braga's July 30, 1998 letter did not establish that Wyatt had already breached the Handshake Agreement.

4. The Handshake Agreement was repudiated by Braga's July 31, 1998 letter. An anticipatory breach of a contract occurs

whenever there has been a definite and unconditional repudiation of a contract by one party communicated to another. Oak Ridge Const. Co. v. Tolley, 504 A.2d 1343, 1346 (Pa. Super. Ct. 1985). A statement by a party that he will not or cannot perform in accordance with agreement creates such a breach. Id. Braga's letter made clear Edwards' intent to terminate the Handshake Agreement before the time to perform had arrived. Braga threatened to negotiate with Phillips if Wyatt did not reply to the letter. Wyatt did not reply, and understood the letter to mean that the Handshake Agreement was terminated.

5. The Handshake Agreement was not reformed, and a new agreement between Edwards and Wyatt was not reached.

6. Wyatt did not waive his defense of repudiation. Wyatt was not required raise repudiation as an affirmative defense in pre-trial pleadings. See Fiberlink Communications Corp. v. Digital Island, Inc., No. CIV.A.01-2666, 2002 WL 1608235, at *1 n.6 (E.D. Pa. July 18, 2002) ("when an action is brought by the repudiating party, anticipatory repudiation is not an affirmative defense that is required to be specifically pleaded in response").

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ORDER

AND NOW, this day of August, 2002, in consideration of the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that judgment is entered in favor of Defendant, A. Wesley Wyatt, and against Plaintiff, John Joseph Edward. This case is **CLOSED**.

BY THE COURT:

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JAMES McGIRR KELLY, J.